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Tomasz Giaro

Russia and Roman Law

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Rg 23 2015 9 – 14

Inhalt

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Julian Krüper 16 Die Verfassung der Berliner Republik. Verfassungsrecht und Verfassungsrechtswissenschaft in zeitgeschichtlicher Perspektive

Fokus focus

Salvatore Cosentino 54 Ravenna from imperial residence to episcopal city: processes of centrality across empires

Miriam Czock 68 Zentralität in der Peripherie: Kirchengebäude als Orte des »Sonderfriedens« in den frühmittelalterlichen *leges*

Luca Loschiavo 83 Was Rome still a Centre of Legal Culture between the 6th and 8th Centuries? Chasing the Manuscripts

Roman Deutinger 110 Recht und Raum in den Anfängen der karolingischen Reform. Zu den fränkischen Synoden 742–762

Wolfram Brandes 120 Apostel Andreas vs. Apostel Petrus? Rechtsräume und Apostolizität

Caspar Ehlers 151 Jihad oder Parusieverzögerung? Zur heilsgeschichtlichen Bedeutung eines Raumes außerhalb des Römischen Reiches

Wilfried Hartmann 174 Synoden schaffen Räume: Metropolen, Diözesen und Pfarreien in den Synodalkanones des 9. Jahrhunderts

*

Cristina Nogueira da Silva 187 A dimensão imperial do espaço jurídico português. Formas de imaginar a pluralidade nos espaços ultramarinos, séculos XIX e XX

Carlos Salinas Araneda 207 La formación de un espacio jurídico transnacional en el siglo XIX a partir del patronato indiano

Mª Julia Solla Sastre 222 Ultramar excepcional. La construcción de un espacio jurídico para España y sus colonias, 1837–1898

*

Massimo Meccarelli 241 The Assumed Space: Pre-reflective Spatiality and Doctrinal Configurations in Juridical Experience

Thomas Duve, Peter Oestmann 255 Normengeschichte, Wissenschaftsgeschichte und Praxisgeschichte. Drei Blickwinkel auf das Recht der Vergangenheit

Wolfgang Ernst 256 Zur Epistemologie rechtsgeschichtlicher Forschung

Inge Kroppenberg, Nikolaus Linder 260 »Textwort und Träger«. Eine Replik auf Peter Oestmann

Kenichi Moriya 263 Rechtsgeschichte provoziert Jurisprudenz

Heikki Pihlajamäki 266 How Much Context Can We Afford? A Comment on Peter Oestmann

Tilman Repgen 268 »Nur schildern, wie es war«

Andreas Thier 270 Zwischen Kultur, Herrschaftsordnung und Dogmatik: Erkenntnisdimensionen rechtshistorischer Forschung

Sandro Wiggerich 274 Rechtsgeschichte und Bedeutung

Jakob Zollmann 277 »Rechtshistoriker als Revisionsrichter«? Über die Frage nach der Moral im Blick auf das Recht der jüngeren Vergangenheit

Kritik critique

Kathrin Brunozzi	284	Dreitausend Jahre Rechtsgeschichte Robert Heuser, Grundriss der Geschichte und Modernisierung des chinesischen Rechts
Michael Stolleis	286	Juristen und »Juristen« James Gordley, The Jurists. A Critical History
Michael Stolleis	290	Heerschau der Rechtsgeschichte in Frankreich Jacques Krynen, Bernard d'Alteroche (dir.), L'Histoire du droit en France. Nouvelles tendances, nouveaux territoires
Achim Landwehr	292	Im Metafeld der Macht Pierre Bourdieu, Über den Staat. Vorlesungen am Collège de France 1989–1992
Agustín Casagrande	294	El otro, el mismo. Inquisiciones sobre un mundo de conceptos Pierre Legendre (dir.), Tour du monde des concepts
Hendrik Simon	297	Unendliche Geschichte(n) Stephen C. Neff, Justice Among Nations
Wolfram Brandes	299	Toleranz und Repression John Victor Tolan et al. (eds.), Jews in Early Christian Law
Carsten Fischer	301	Deconstruction, reconstruction Karl-Heinz Spieß (ed.), Ausbildung und Verbreitung des Lehnswesens im Reich und in Italien im 12. und 13. Jahrhundert
Harald Maihold	305	Die theologischen Bezüge des menschlichen Gesetzes Francisco Suárez, De legibus ac Deo legislatore. Über die Gesetze und Gott den Gesetzgeber
Thomas Duve	307	Grenzenlose Räume Tamar Herzog, Frontiers of Possession. Spain and Portugal in Europe and the Americas
Tomasz Giaro	309	Russia and Roman Law Martin Avenarius, Fremde Traditionen des römischen Rechts

Kritik critique

Daniel Damler 320 Bettgeschichten

Gabriele Jancke, Gastfreundschaft in der frühneuzeitlichen Gesellschaft

Claudia Curcuruto 322 »Pecunia nervus rerum«: Justitia als Merkurs hörige Schwester

Michael Ströhmer, Jurisdiktionsökonomie im Fürstbistum Paderborn

Johannes Liebrecht 325 Teile ohne Ganzes

Claudia Lieb, Christoph Strosetzki (Hg.), Philologie als Literatur- und Rechtswissenschaft

Santiago Legarre 329 Fortalezas y debilidades en el estudio del constitucionalismo latinoamericano

Roberto Gargarella, Latin American Constitutionalism, 1810–2010

Laila Scheuch 331 Unrecht der Ehe

Karin Gottschalk (Hg.), Gender Difference in European Legal Cultures

Stephan Meder, Christoph-Eric Mecke (Hg.), Family Law in Early Women's Rights Debates

Tim Stretton, Krista J. Kesselring (Hg.), Married Women and the Law

Peter Collin 337 Populäre Justiz – jetzt auch in der Rechtsgeschichte!

Émilie Delivré, Emmanuel Berger (eds.), Popular Justice in Europe (18th – 19th Centuries)

Ulrich Jan Schröder 341 Haus ohne Fundament?

David Sörgel, Die Implementation der Grundlagenfächer in der Juristenausbildung nach 1945

Marginalien marginalia

Jorge E. Traslosheros 347 Proceso judicial eclesiástico, seguido en la Audiencia del Arzobispado de México, contra unos gusanos «negros y larguillos». Año de 1653. Nota introductoria y documento

Abstracts 367 abstracts

Autoren 374 contributors

Tomasz Giaro

Russia and Roman Law*

The question of Russia's European identity has traditionally been controversial. Usually, the country is either defined as belonging to Eastern Europe in a narrower sense or, contrarily, totally excluded from the concept of Europe.[1] From the times of Czar Peter the Great (1689–1725), Russia acquired the unquestioned status of a European power; however, despite the »enlightened« reforms of Empress Catherine the Great (1762–1796), its society remained feudal, its economy backward and its government autocratic. Right up until its collapse, the Russian Empire was decidedly less urbanized and less advanced in agriculture in comparison not only with the West but also with East-Central Europe.[2]

The backwardness of Russia was essentially determined by the deficiencies of Russian law. Even if our thinking about Russian law has long been focused on the Bolshevik revolution of 1917 and the consequences thereof, the author quite rightly views the 19th century as a crucial period of Russian legal history. It was a time when Russia joined the continental legal family founded upon Roman law and its tradition. The reception of Roman law in Russia was not only a purely legal phenomenon, but also a political and cultural question. Roman law was considered by some Russian jurists as providing the basis for a strong and stable state power and by others as securing the very foundation of the rule of law.

The author reflects on the connection between Russia and Roman law in 20 chapters. I will scrutinize each of them by way of review. Chapter 1, equivalent to an introduction (21–44), considers the traditional general question of the role played by Roman law in European legal history. If we follow the author in regarding Roman law as law *par excellence* (21), his monograph on the role of Roman law in Russian legal culture may be easily considered as devoted simply to the role of law in Russian culture. As a matter of fact, according to some scholars, Roman law might be treated as legal science *tout court* (318) and, according to others, as a kind of legal theory (350–351, 374–375).

In chapter 2 the author exposes in detail the premises and the methods of his inquiry (45–93). Following the authoritative German legal historian Franz Wieacker (1908–1994), the author stresses the specific legalism of the western legal tradition as a feature that continues to distinguish it from Eastern Europe (88). The historical experience also demonstrates that even the extremely strong influence of the Orthodox culture of Byzantium was unable to compensate in Russia for the absence of western Roman law, which operated everywhere in continental Europe as a stimulus of individualism and civil society (89, 91).

Chapter 3 summarizes the present state of the art concerning the influence of Roman law in Russia (95–116). The majoritarian opinion amongst modern Russian legal scholars denies the very possibility of qualifying this relationship of influence as a reception of law in the strict sense (113). Despite the rigorism of the Russian doctrine, the author, who has already dedicated a short book to the subject, confirmed by the fact that a translation was also published in Russia,[3] argues convincingly in favor of the adequacy of the concept of reception in reference to the role played by Roman law in the Russian Empire during the 19th century (117).

Chapter 4 continues to discuss the general conceptual problems concerning the reception of laws in history (117–127). The object of this particular reception, which occurred within the borders of the Russian Empire during the 19th century up to the October revolution of 1917, was evidently not the ancient private law of the Romans, but primarily its modern 19th century German doctrine known in legal history as Pandect science (121).

* Martin Avenarius, Fremde Traditionen des römischen Rechts. Einfluß, Wahrnehmung und Argument des ›rimskoe pravo‹ im russischen Zarenreich des 19. Jahrhunderts, Göttingen: Wallstein 2014, 776 S., ISBN 978-3-8353-1541-9

1 In the latter sense Bideleux and Jeffries (1998) 8–15.

2 Johnson (2002) 91.

3 Avenarius (2004); Avenarius (2008).

The main effect of this reception was a scholarly rationalization of Russia's traditional legal order (125), which turned it into a science: a process described by the author with the untranslatable German word *Verwissenschaftlichung* (120–121).

Chapter 5 examines Russian private law prior to the 19th century (129–194). The author evokes the Kievan Ruš (132): the first Russian state preceding the domination of the land by the Mongols called »Tatar yoke« (1240–1480) which represents a critical period when the center of political power in Russia shifted northwards to Moscow. The Ruš was influenced early on by Byzantine law which, according to the spirit of orthodoxy, mixed religious and secular elements with both public and private aspects. Consequently, as early as during the second half of the 13th century, the Orthodox clergy applied the full translations of *Ecloga* and *Prochiron* in Russia's ecclesiastical courts.

During the rule of Grand Prince Ivan III the Great (1440–1505), who liberated the country from the Mongols, Byzantine law was underpinned in Russia by its new imperial pretensions – which roughly resembled the western *translatio imperii* (138–139). Indeed, following the capture of Constantinople by the Ottomans, which took place in 1453, certain Orthodox canonists regarded the grand princes of Moscow as the successors to the Byzantine emperors. In accordance with this line of thought, Ivan III the Great married Sophia Palaiologina, a niece of the last Byzantine Emperor Constantine XI (1449–1453). Hence the subsequent Moscow princes welcomed the idea of Muscovy as the »third« Rome.[4]

However, early modern Russian law, including the *Sobornoe Ulozhenie* of 1649, which was the first attempt at systematic legislation in Russia, shows few traces of the Roman-Byzantine influence (140–147). The legal occidentalization, which started in Russian constitutional and private law only at the beginning of the 19th century, remained limited to the doctrinal level. In private law, the reform undertaken by Count Mikhail Speranski was intended to espouse the French *code civil* and the Institutes of Justinian (183–185). However, following the Napoleonic invasion of 1812, these plans were abandoned in favor of the traditional »Collection of Laws« (*Svod Zakonov*), volume X.1 of which contained private law.

Chapter 6 considers the role played by Roman law in the elaboration of the *Svod Zakonov* (195–229). This definitive collection of traditional Russian laws, published by Speranski in 1833 (198), nonetheless, remained influenced to an extent by the Napoleonic *code*.[5] On the whole, the *Svod* was casuistic, unmethodical and unsystematic. Even if its private law did contain some Roman transplants here and there that were intermediated by modern western legislation (229), it was decidedly more a compilation than a codification (202–203). The *Svod Zakonov* was, generally speaking, not yet a work of legal scholarship (260–261), but rather of political reaction.[6]

Chapter 7 covers the role of Roman law in the professionalizing of Russian jurists (231–270). Prior to the 19th century, the age of an extensive transfer of civilian tradition to Eastern Europe, no learned law, no juristic literature and no juristic profession of the western type were known to Russia.[7] The first step in the professionalization process was taken in 1829 (237, 240, 245) when young Russians went to Berlin in order to study under the great German jurist Friedrich Carl von Savigny (1779-1861). Also worth noting are the Russian students who later studied privately under Carl von Vangerow (1808–1870) in Heidelberg and under Rudolf von Jhering (1818–1892) in Göttingen.

Chapter 8 is dedicated to Roman law in its function as one of the main disciplines in Russian legal education (271–280). Compared to western universities, the Russian institutions of higher learning were considerably belated and underdeveloped. Universities were first founded only in 1755 in Moscow, 1804 in Kazan, 1805 in Kharkov, 1819 in Petersburg and 1834 in Kiev (233, 277). Around 1850, the Russian historical school of legal scholarship, represented by Konstantin Kavelin (1818–1885), Sergey Solovyov (1883–1900) and Boris Chicherin (1828–1904), was established at

4 Uspenskij (1991) 113–129; Meyendorf (1991).
5 Bernard (2004) 83–84; Rudokvas (2006) 59–61.
6 Gilardeau (2003).
7 Georgesco (1988) 32–33.

the University of Moscow (267). Its Statute, released in 1835, attributed the main role in legal education to Roman law (275–276).

Chapter 9 deals with the beginnings of an autonomous scholarly treatment of Russian private law (281–296). In this respect, the paramount role was played by the Roman lawyer Dmitri Mejer (1819–1856), a juristic teacher of Leo Tolstoy and a very talented jurist, who died at the early age of 36. Following the model of classical Roman law, for the first time in Russia, Mejer distinguished between the concepts of ownership as title and possession as actual enjoyment (291–293); in contrast to the Russian tradition, embodied in the *Svod Zakonov*, he also classified the transaction of sale not merely as a device for acquiring ownership, but as an independent obligatory contract (293–296).

Chapter 10 discusses the place of Roman law in the general culture and in the socio-critical literature of the Russian Empire during the 19th century (297–309). Within society, the Slavophiles, who considered the West morally bankrupt, were therefore declared enemies of Roman law (298), whereas the Westernizers, such as the young Alexander I. Herzen (1812–1870), supported it wholeheartedly (303). The strongest conservative thinker Konstantin P. Pobedonostsev (1827–1907)[8] used to stress the contrast between Roman law, with its unlimited egoistic concept of ownership, and Russian law, which was oriented towards the collective consciousness and the hierarchical spirit of Orthodoxy (309).

Chapter 11 is devoted to the court reform of 1864, designed by the »progressive« Czar Alexander II (311–323). More precisely, it was a set of reforms that also included the adoption of a civil and a penal judicial procedure of the French type. These events inaugurated the golden age of Russian law (316), surviving even the profound political reaction led by the subsequent Czar Alexander III (1881–1894). The modernization of Russian law, which followed the court reform, made use of Roman law's legacy, in particular of its distinction between private and public law (319–321), intensely promoted by the Moscow civil law specialist of Polish nationality Gabriel F. Shershenewitch (1863–1912).[9]

Chapter 12 deals with the reform of legal education (325–370), which in 1884–1885 bestowed upon Roman law a level of importance that it had never previously enjoyed; consequently, the Russian curriculum dedicated more hours per week to Pandect science than several law schools in Germany where Roman law was, at that time, in effect (326). As an example of a timeless legal order Roman law became in Russia an important examination matter; the aim of this intense study of Roman law was to elevate the professional ethics of the Russian jurist and to improve his knowledge of two pieces of foreign legislation which were in force within the Russian territory: the French *code civil* in central Poland and the code of Friedrich G. von Bunge in the Baltics.

The latter was a compilation of local customary private law published in St. Petersburg in 1864 as the third volume of the »Provincial Law of the Baltic Provinces«. From the systematic perspective, it was – similar to the civil code of Saxony enacted one year prior – a product of German Pandect science.[10] The code of Bunge in turn influenced Russia through the cassation judicature of the Petersburg Governing Senate. Indeed, the jurisprudence of the Senate was eager to preserve and promote the Baltic code which, at a technical-systematic level, was much more advanced than the Russian *Svod Zakonov*, even if the contents of the Baltic code embodied the local, as opposed to western, tradition.[11]

Within the framework of promoting legal education, in 1887 the imperial government of Russia established a Russian Seminar of Roman Law at the Law Faculty of Berlin University (333). The seminar, active until 1896, was presided over by three renowned German professors of the discipline: Ernst Eck (1838–1901), Heinrich Dernburg (1829–1907) and Alfred Pernice (1841–1901). Graduates of the seminar included numerous outstanding experts of Roman and civil law, amongst whom featured David D. Grimm (1864–1941), Alexey M. Gulaev (1863–1923), Leon Petrazycki

8 About him see Dykstra (2002–2007).
9 Turłukowski (2013); Bosiacki (2013).
10 Dölemeyer (1982) 2083–2098.
11 Luts (2006) 175–190.

(1867–1931), Iosif A. Pokrovskij (1868–1920), Wilhelm von Seeler (1861–1925) and Paul E. von Sokolowski (1860–1934).

Chapter 13 offers a detailed examination of Russian legal literature concerning Russian private law and Roman law (371–390), most notably from the point of view of its relationship with its Western European counterpart. In St. Petersburg, as the capital city of the Russian Empire, such outstanding legal scholars as Nikolai L. Dyuvernua (1836–1906), a follower of Jhering, lectured during the 1860s and 1870s. From the intense scholarly treatment of Roman law emerged in particular the concept »dogma of Roman law« (373) which belonged however more to a systematic general theory of private law, in the sense of German Pandect science, than to legal history.

In the years 1858–1859, Mejer wrote the first Russian handbook concerning the general theory of private law based upon Roman law (377). Somewhat later, commentaries to the civil law of the *Svod Zakonov*, for instance, that of Igor M. Tyutryumov (1855–1943), and numerous translations from the German literature of Roman law were published. Translations of the Pandect handbooks by Heinrich Dernburg and Julius Baron served in Russia, as it was the case in Germany, as introductions to the local private law. The Russian translation of »Institutes of Roman Law«, written by the Austrian professor of Czech origin, Karl Czyhlarz, also proved very popular (381–386).

Chapter 14 considers the juristic debate on the significance of Roman law that was conducted in Russia during the last third of the 19th century (391–453). Following the period of Savigny's influence, it was Jhering who dominated the Russian stage of Roman law (400–402). And it was his pupil Sergey A. Muromtsev (1850–1910) who founded Russian legal sociology (420). Another Roman lawyer, St. Petersburg professor of Polish origin Leon Petrazycki, invented the science of civil law policy (428–431).[12] Shershenewitch based his handbook of private law on comparative scholarship (440). Finally, the »Fundamental problems of private law« by Iosif A. Pokrovski (1869–1920) are discussed (446–453).

A long chapter 15 is dedicated to the legal practice of the St. Petersburg Governing Senate (455–519). Following the abolition of serfdom and the judicial reform, from the early-mid 1860s, the Cassation Department of this highest imperial court notably modernized the hitherto backward Russian private law, promoting in particular the free sale of peasant's land and the freedom of testation.[13] This Russian judge-made law was heavily influenced by German Pandect science, romanizing first of all property, acquisitive prescription, preemption, limitation of claims, possession, as well as pledge and auction (483). Also the Roman distinction between private and public law was finally acknowledged (492).

Chapter 16 discusses the projects of the Russian civil code drafted at the turn of the 20th century (521–578). The preparatory process was overlong. In the year 1882, a commission for the codification of a Russian civil code was appointed by Czar Alexander III (525); in 1899 it published a draft of the law of obligations and in 1905 the draft of the complete civil code (527). At the end of 1913, a new partial draft of the law of obligations, based on the *Svod Zakonov* and on several western civil codes, was presented to the Russian parliament: the so-called fourth Duma of 1912–1917. However, the draft was never adopted and not pursued further due to the rapid outbreak of World War I (528, 534).

The impact of German private law on the Russian drafts was particularly strong.[14] In the spirit of Pandect science, local Russian institutions were adapted to their Roman pattern; yet, when it came to the *travaux préparatoires* of the Russian code, the German handbooks of Pandect science were cited much more frequently than historical Roman sources (532). As early as 1898, a Russian translation of the German civil code (BGB), despite not yet being in effect, appeared in print. Moreover, in the spring of 1912, a new Russian Institute in Berlin, directed by the eminent legal historian Emil Seckel (1864–1924), was inaugurated. However, outbreak of World War I quickly spelled the end of its activity (576–578).

Chapter 17 is dedicated to the struggle for the rule of law on the part of Russian jurists during the final stages of the pre-revolutionary period (579–589). Numerous professors of Roman law participated in this movement, being members of

12 Giaro (1995).
13 Butler (1989); Popkins (1999).
14 Rudokvas (2007) 13–16.

the liberal party of Constitutional Democrats, called K-D Party or Kadets, e. g., David D. Grimm, Gabriel F. Shershenewitch, Iosif A. Pokrovski, and Leon Petrazycki. In particular, one of the most distinguished Russian pupils of Jhering, the Roman lawyer Sergey A. Muromtsev, became the head of the liberal constitutional movement and the first speaker of the first Duma, which remained active until July of 1906, when it was dissolved by Czar Nicholas II (581–582).

Even if the Soviet Union officially renounced any continuity with the old Russian Empire (594),[15] the author dedicates a separate conspicuous chapter 18 to »Roman« legal thinking following the October Revolution (591–641). As a matter of fact, in the aftermath of the Soviet Union's collapse, the importance of the caesura of the Revolution still continues to diminish in Russian legal historiography (597). In this context, the author distinguishes between the two following periods in the Soviet approach to Roman law: from 1917–1922 Roman law was principally rejected, whereas later, from 1922–1937, this negative attitude underwent a degree of mitigation (601).

As evidence of the former attitude held by the Soviet authorities, the author cites two of Lenin's famous utterances. In a note to the People's Commissar for Justice Dmitri I. Kursky (1874–1932), written in February 1922, Lenin completely delegitimized the traditional western type of private law: »We do not recognize anything ›private‹; for us everything in the area of the economy is public law …«.[16] In the same note, in reference to the first Soviet decrees on the court enacted at the turn of 1918, which obliged the Soviet courts to follow either the new Soviet statutes or the »socialist consciousness«, Lenin instructed Soviet judges again »to apply not the *corpus iuris romani* …, but our revolutionary consciousness« (604–605).[17]

This reviewer remains, however, uncertain as to whether Lenin's two laconic phrases refer specifically to ancient Roman law. As a matter of fact, during the 1920s, both leading specialists of Soviet civil law Petr I. Stuchka (1865–1932) and Evgeny B. Pashukanis (1891–1937) denounced all law as an epiphany of the bourgeoisie destined to die off very soon. Even if it was the former who said, »Communism means not the victory of socialist law, but the victory of socialism over any law«, the statement cited also summarizes the point of view of the latter, who notoriously invented the famous theory regarding the so-called »withering away of the law«, recorded by the author (626).

However, the so-called war communism from 1917–1921, committed to legal nihilism, was soon succeeded by the more civilized period of the New Economic Policy (NEP), stretching from 1921 to 1929. Under the NEP, Russian authorities returned to the traditional instruments of governance by law. In particular, as early as December of 1922, the by no means revolutionary civil code of the Russian Federative Republic (RSFSR) was promulgated. The law of succession, which had initially been completely abolished, remained under the NEP only restricted with the help of taxation measures and legal limitations already present in Art. 416–417 of the Russian civil code of 1922 (607).[18]

The presidency of the Commission for the code was entrusted to Vasilij A. Krasnokutski (1873–1945) and the final redaction thereof to Aleksandr G. Goichbarg (1883–1962). Both had benefited from a pre-revolutionary legal education. The system of codification stems from the Pandect science, even if family law was moved to a separate code. As a follower of Duguit's *fonction sociale*, Goichbarg granted protection only to those rights that did not conflict with their socio-economic function (Art. 1). Also, the right of property was functionally differentiated as state, cooperative, and private property (Art. 52). On the whole, the code seemed to be, however, only an abridgement of the imperial drafts (612–613).

The western character of the code is elucidated by the author by appealing to the factor of personal continuity. He indicates several Soviet jurists who completed their education before the revolution, e. g., Aleksandr M. Vinaver (1883–1947), Michail A. Reisner (1868–1928), and the codifier Krasnokutski (622–625). Nevertheless, the author contests the position of Harold J. Berman (1918–2007),

15 Izdebski (1987) 843–850.
16 A recent treatment in Mańko (2015).
17 Giaro (1999) 254; Bosiacki (2008).
18 Zile (1986) 218–219.

according to whom the Russian legal system was quintessentially European since the 19th century. The author stresses, in contrast, that only the exterior form of old rules was conserved, while the pivotal elements of private law, subjective rights and in particular the right to property, were devalued in the new context (628–631).

Consequently, the author embraces the prevailing opinion of Soviet civil law specialists who attribute to Roman law merely a theoretical significance (631). On the other hand, he endorses as well the slightly different position that Roman law has retained a certain importance for the practical dogmatics of Soviet civil law, even in its later form in the 1964 civil code of the Russian Federative Republic (633). However, Roman law was restored to the study programs of Soviet law schools only in 1945. Furthermore, the first Soviet handbook of Roman law (638), a collective work edited by Ivan B. Novitski (1880–1958) and Ivan S. Pereterski (1889–1956), appeared as late as 1948.

Chapter 19 returns to the problems of a general – almost historiosophical – character, which were already addressed in the initial four chapters of the book. This second to last chapter takes into consideration the present time and the prospects for the future of Roman law in Russia (643–660). The author stresses that, in Russia's contemporary legal culture, Roman law continues to play the role of an alternative denomination of the western legal tradition. In this sense, the concept of Roman law is currently understood in numerous papers of Russian legal scholars dedicated to examining its influence upon the new civil code of the Russian Federation enacted between 1994 and 2008 (645–649).

Chapter 20 contains some final considerations (661–665). According to the author, in the wake of the systemic change following the dissolution of the Soviet Union and the collapse of communism between 1989 and 1991, Roman law is no longer interpreted in the socialist spirit; on the other hand, nor is it understood as a token of private law having an unlimitedly liberal character. Contemporary Russian private law, which still lacks effective protection of subjective rights,[19] continues indeed to be strongly exposed to the risks of instrumentalization. Moreover, it is frequently misrepresented as an incarnation of justice infused by the proverbial »spirit« of Roman law (665).[20]

I will close this review with some subjective comments on Prof. Martin Avenarius's praiseworthy study. His book, which in the initial and final chapters touches upon fundamental problems of European legal phenomenology in the East and West, informs the reader of nearly everything regarding the role of Roman law in Russia's contemporary legal culture. However, even if it may seem somewhat exaggerated to require further elucidations from a book of already considerable length, a look over the Russian borders might have saved us now and again from the danger of explaining unspecific or even ubiquitous phenomena »by the circumstances peculiar to one time and place«.[21]

First of all, let us start with the trivial statement that neither the medieval reception of Roman law was limited to Western Europe, nor was the reception of Byzantine law in the East limited to Russia. Moreover, the effectiveness of Byzantine law outside Byzantium has always been problematic. Even if it was basically the same old Roman law elaborated in Greek by the Constantinople professors (*antecessores*), its normative substratum differed somehow from the Western one. As in the Balkans, the objects of reception in Russia were, except for the ecclesiastic *Nomocanones*, abridgments dismissively defined by some scholars as »extracts of extracts«, e. g. the *Ecloga*, *Prochiron* and the *Epitomai* of the Basilics.

All of these legal sources were written in a local language, standardized in the 9th century for the sake of Christianization of Slavic peoples as Old Church Slavonic.[22] This language ensured to the aforementioned extracts a popular character which contrasted with the learned Latin law of the West. Conversely, the simplified and »unlearned« reception of Byzantine law in Eastern Europe necessarily ignored the richness of Roman casuistry. As a consequence, the Eastern reception remained per-

19 Osipian (2012); Markus (2015).
20 Kartsov (2007).
21 Gordley (2006) 754.
22 Ščapov (1986) 492; Maksimovič (2006) 4–6.

manently cut-off from the inspiring sources of classical Roman law; as a purely symbolical operation of basically religious nature, it was incapable of inducing any kind of practical synthesis between the written Roman law of Byzantium and local folk laws.

In this situation, the largely unrecorded, and thus non-romanized, customary law of the Slavic population flourished. Devoid of Roman casuistry contained in the law books of Justinian, the Orthodox East lacked from the beginning any developed secular legal doctrine of the western type. Neither the original Latin text of the *Corpus Iuris Civilis*, nor its Greek version from the late 9th century, called Basilics, were known in Russia until the end of the 17th century. As a result, this symbolical reception revealed itself incapable of scholarly study and practical adaptation of ancient legal sources. In Russia, as elsewhere, the Byzantine world failed to produce any manageable synthesis between Byzantine law and local Slavic laws.

However, during the 19th century, the models of legal system changed in Russia and, even more rapidly, in South-Eastern Europe.[23] So, the close relationship between the legal renovation of that time and Roman law remained in no way limited to Russia. In South-Eastern Europe, the gradually retreating Ottomans left behind a very archaic law: in Greece it was the Byzantine *Hexabiblos* of 1345 and in the Slavic countries the equally old customs remained »mummified« throughout the centuries. From the viewpoint of capitalist trade, this must be qualified as constituting a legal vacuum. Hence, the new Balkan states exchanged almost overnight their outdated Byzantine model for a well-modernized western one.[24]

Toward the end of the 19th century in Russia, as in other Eastern European countries where the strong national-conservative movement impeded liberal codifications of private law, the influence of German Pandect science superseded the domination of the French doctrine. The judicial reception of the Pandect scholars was a noteworthy feature in the judicature of the St. Petersburg Governing Senate relative to the volume X.1 of the *Svod Zakonov*. Moreover, the Russian judicature in Bessarabia, acquired by the Czar's Empire in 1812, modernized the Byzantine *Hexabiblos* parallel to the coeval and equally German-influenced judicature in Greece, where the same *Hexabiblos* was in effect.[25]

In any case, the Russian Slavophil movement identified the hatred modern western law with ancient Roman law. By contrast, in 1825 the draft civil code for the Russian Bessarabia, prepared by Petru Manega, a Paris-trained Moldavian jurist of Greek origin, justified its recourse to the French *code civil* with the argument that a reception of Roman law had already taken place in ancient Bessarabia.[26] In summary, the Russian legal modernization of the 19th century, which quintessentially remained limited to the world of universities and the jurisprudence of the highest courts, was characterized by a kind of idling that recalls the coeval modernization in the Balkan area as well as the medieval reception of Byzantine law.

The second issue to be considered from a broader perspective is that the rapid assimilation to the western legal tradition, so clearly observable in the Russian legal system during the 19th century, was by no means limited to Roman law or to western private law in general. In chapter 17 (579–589), it is evident that the author does not ignore the problems of constitutionalism; a phenomenon particularly belated in Russia. However, one may add that the Czar's Empire also operated as an exporter of western models rejected within its own borders. By means of such »constitutional diplomacy«,[27] Moscow was able to supply numerous countries in East-Central and South-Eastern Europe with western legal patterns.

Let us briefly move on to a review of some Eastern European countries that, during the 19th century, found themselves under Russian tutelage. The constitution of the Ionic Isles, promulgated in 1803, was inspired by the models of the French Revolution, whereas both the 1815 constitutions of the Free City of Cracow and of the

23 Giaro (2014) 100–103.
24 Benacchio (1995) 70; Giaro (2013) 40–41.
25 Rudokvas and Novikov (2009).
26 Maksimovič (2006) 26–27; Soleil (2013) 6–7.
27 Grossul (1996) 65, 70–81.

Congress Poland followed the Bourbonic *charte* of 1814. The latter also affected the *Règlement organiques* of the Rumanian Principalities enacted in 1831–1832 as well as the Serbian constitution of 1838, referred to as the »Turkish« constitution. Furthermore, the never-implemented Greek constitutions of Troizina and Argos (1827 and 1829) also probably arose under Russian influence.

The German concept of legal state (*Rechtsstaat*), roughly equivalent to the ›rule of law‹, was known to Russian constitutional thought as *pravovoe gosudarstvo* only starting from the 1880s.[28] Yet, the Bulgarian Tarnovo-constitution of 1879, prepared with vital Russian assistance, already followed the 1831 liberal model of the Belgian parliamentary monarchy. However, within the Czar's Empire itself, the Prussia-inspired first-ever Russian constitution of 1906 remained a 'dead letter' until the February Revolution of 1917, when a short interruption of autocracy made room for a parliamentary government. The Russian penal code of 1903 belonged to the most modern of its time, even if it only partially went into effect.

Immediately following the October Revolution, Russia, which had previously moved closer to the legal world of the West, sought to step back from it, in particular with respect to constitutional and public law. Paradoxically, this operation sometimes took place by means of a return to Czarist tradition, particularly in the realm of administrative law that adopted the structure of the pre-revolutionary government and ministries. Evident elements of continuity between the pre-revolutionary and the Soviet legal system were also present in other branches of public law. This is true primarily of constitutional theory, but also applied to criminal law practice which, for instance, restored the traditional banishment penalty as early as 1922.

Thirdly, let us shortly discuss the still highly controversial question as to whether Soviet law constituted an autonomous legal system that eventually became the »mother« of the whole socialist legal family and was distinct from continental civil law.[29] The author confines himself to the negation of the renowned inclusive thesis of Harold J. Berman. However, after Berman had extended the concept of western legal tradition not only to East Central Europe, but also to Russia, the belief in the European character of Soviet law gained a wide recognition.[30] Given its recently discovered Romanist elements, Soviet civil law may be considered as belonging part and parcel to the continental legal family or, at the very least, represent a chapter of western legal history.[31]

Evidently, the question as to the continental character of the Russian legal system may be answered in positive terms only upon the condition of following the technical criteria of the officially acknowledged system of legal sources and the equally authoritative law-finding method. As a matter of fact, unlike in the common-law system, Soviet judicial decisions should always have been derived from a previously stated abstract statutory rule. From the perspective of legal technique, Soviet law was therefore quite rightly deemed to constitute part of the continental system. Consequently, Soviet law availed itself of the systematic fiction of law-application and explicitly excluded the rule of precedent.

Only the short period of war communism between the years 1917 and 1921 was characterized in the Soviet Union by a kind of legal nihilism. Looking forward to new decrees of the new Soviet power, this renovated nihilism, which in the Russian legal tradition was anything but new, recognized the »revolutionary« or »socialist« consciousness of the Soviet judge as the only valid source of law. Such judicial activism was still recommended by Lenin in his above-cited utterance of 1922 in reference to the old legal order, which he sarcastically defined as *corpus iuris romani*. Nevertheless, subsequently the model of deducing judicial decisions from abstract legal rules became absolutely paramount in the Soviet Union.

On the other hand, following the value-laden criterion of the liberal concept of law, which is supposed to guarantee to every citizen personal freedom, individual justice, and legal certainty of acquired rights, particularly of property and real property rights, Soviet law reveals itself as also having been extensively shaped by Marxian ideology. As a consequence, Soviet law should rather be

28 van den Berg (1977); Oda (1999).
29 Partlett (2008).
30 Berman (1983) 539; Osakwe (1985).
31 References in Giaro (2011) 12.

opposed to western legal tradition, whether in the guise of common law or civil law, or any imaginable mixture thereof. In this sense, ideology may well be considered the ultimately autonomous factor of Soviet – and in a broader perspective – socialist civil law.

Naturally, the autonomy of Soviet law is more easily accepted within the constitutional domain; however, from the historical point of view, the same holds true with respect to private law. As a matter of fact, Marxism grew essentially as a critique of capitalist private law. Consequently, many comparative lawyers and experts in Sovietology considered Soviet law a completely original phenomenon of legal taxonomy. To the contrary, some legal historians, particularly Helmut Coing (1912–2000), insisted on the medieval religious divide between »Europe« (including East-Central Europe) and »Byzantium« (encompassing Russia and the Balkans) which they deemed to continue its existence even after the 1917 revolution.[32]

The abolition of all pre-revolutionary law, accomplished in the Soviet Union in November of 1918, also included private law, in particular the law of landed property and of succession. The effect of the nationalization process of the land was the destruction of the very foundations of private property.[33] However, the author correctly stresses that Soviet civil legislation, in particular the Russian civil code of 1922, was drafted by pre-revolutionary jurists who gave it, at the technical-doctrinal level, a very traditional form. With its »general part«, as well as with the general clauses of the social function of law and of the abuse of right, the 1922 code demonstrates the clear influence of the Pandect science and of the »juristic socialism« of Léon Duguit and Anton Menger.[34]

It was only during the 1930s, when Stalin's Second Revolution was proclaimed, that the characteristic Soviet doctrine concerning the types and forms of property emerged. Stalin's constitution of the USSR, promulgated in 1936, declared the soil and its treasures to be the exclusive property of the state, which could only be temporarily used by other subjects. In the »Principles of the Legislation of the USSR«, enacted in 1961, property was either socialist or individual; the former was state or cooperative property, the latter private or personal. Given the functional binding, socialist property served only the fulfillment of national economic plans, whereas personal property served exclusively individual needs.

However, the differentiation of property according to its object and the model of externally controlled state enterprise was not invented by Soviet jurists. Western liberal capitalism had already distinguished between property as an absolute unitary right of possession, on the one hand, and the mere usage or disposal thereof, on the other. With respect to landed property and industrial enterprise, the social limits became the very content of the right. As regards the property of shares, the right of usage and substantial rights parted ways: property in the technical sense remained with the enterprise, whereas decisions concerning strategy and the choice of managers were made externally by the majority stockholders.[35]

The conservatism of Soviet lawyers is a vast topic, which is observable in private law, above all in the law of the economy and state ownership. The former was presented by Stuchka as early as 1929, accompanied by a farewell to private law destined to soon be substituted by a law of a plan-guided administration of mass supply. However, this idea was discredited in 1938 by Andrey Y. Vyshinsky (1883–1954).[36] The already cited 1961 »Principles« embraced the standpoint of the unity of civil law, which was, however, contrasted with Czechoslovakia and East Germany. The principle of unity required a sharp distinction between public administrative and private civilistic aspects within the legal regulation of the economy.

On the other hand, the dogma of the unity of state property gave birth to the famous crux of subjective rights vested in the state-owned enterprises over the portions of national property administered by them. The very problem was formulated according to the abstract method of German Pandect science rather than in the flexible case-law style of thought and, consequently, could not be resolved in a satisfactory manner until the final

32 Coing (1989) 10–11.
33 Zile (1986) 207–212, 218–229.
34 Giaro (1999) 256–257.
35 Hedemann (1922); Giaro (1999) 251.
36 Bosiacki (2006).

collapse of real socialism. This problem, which evidently descended from the »simplistic« character of civil-law property as presupposing the strong exclusivity of the entitlement, was evidently common to most countries of real socialism.[37]

The voluminous and not less meritorious monograph of Prof. Avenarius appeared under the somewhat puzzling title of »Alien traditions of Roman law« which, for this reviewer, remained puzzling right up until the end of the lecture. In any case, the monograph certainly now constitutes the most useful source of scholarly information on the complex subject of the vicissitudes of Roman law and its tradition in modern Russia. In this reviewer's opinion, the only desideratum which may be addressed to the author in reference to future editions of his valuable book is to set the Russian legal system and legal culture to an even greater extent against the background of other countries in both Eastern and Western Europe.

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37 Lawson (1967) 420; Giaro (1999) 276–280.

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